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IN THE

Supreme Court of the United States

October Term, 1966

No. 729

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Petitioner,

—against—

STRACHAN SHIPPING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondent Strachan's opposing brief largely repeats its arguments in its pending petition in No. 741 that ultimate determination of whether Strachan breached its warranty of workmanlike service, and of whether petitioner Royal's conduct precluded recovery of indemnity, are fact issues which the trial court is conclusively deemed to have found in Strachan's favor by operation of F. R. Civ. P. 49(a). Royal's opposing brief in No. 741 explicates the fallacies of this argument.

Strachan's opposing brief in this case No. 729 also urges that the trial court's charge was fatally inadequate because it did not define or request a finding of "proximate cause" with an appended requirement of "foreseeability"; did not expound and then excise from jury consideration the legal

obligations of Royal and Strachan to the injured longshoreman; and did not state that Royal had the burden of proof.

Strachan requested an elaborate charge on "proximate cause", including that: "To be a proximate cause of an event it should be reasonably anticipated and foreseen by a person of ordinary prudence in the exercise of ordinary care that such event or some similar event would result from such cause as a natural and probable consequence" (R. 91). However, *Italia Soc.* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964), which held that a stevedore breached its warranty of workmanlike service by non-negligently furnishing latently defective gear, refutes the notion that the shipowner cannot recover indemnity without proof that the stevedore actually foresaw the damaging consequences of its warranty breach. The foreseeability of such damage is imputed by law. *De Gioia* v. *United States Lines*, 304 F. 2d 421, 426 (2 Cir. 1962); *Revel* v. *American Export Lines, Inc.*, 162 F. Supp. 279, 288 (E. D. Va. 1958), aff'd 266 F. 2d 82.

Here, every reasonably inferable cause of the accident was submitted for jury decision by "written questions susceptible of categorical or other brief answer", F. R. Civ. P. 49(a), and the jury found that a variety of contributing faults by Strachan were the sole cause of the accident, thereby mandating entry of judgment for Royal as a matter of law. *American Export Lines* v. *Atlantic & Gulf Stevedores*, 313 F. 2d 414, 416 (4 Cir. 1963), cert. denied 373 U. S. 924.

Furthermore, since a primary goal of F. R. Civ. P. 49(a) is to obviate complex, legalistic jury charges, *R. H. Baker & Co.* v. *Smith-Blair, Inc.*, 331 F. 2d 506, 511 (9 Cir. 1964),

use of the special verdict freed the trial court of any need to use or explain "the good old fashioned dialectic of proximate causation with all of its built-in metaphysical concepts of natural and unbroken sequence, but for, foreseeability of harm and the like." *Page* v. *St. Louis Southwestern Railway Co.*, 349 F. 2d 820, 822, 824, 827 (5 Cir. 1965).

It also was unnecessary, and there were cogent reasons not to, muddle the jury with cautionary instructions respecting the distinction between Royal's and Strachan's liability to the injured longshoreman and Strachan's liability to Royal. F. R. Civ. P. 49(a) instructs that the "court shall give to the jury such explanation • • • as may be necessary to enable the jury to make its findings upon each issue • • • of fact raised by the pleadings or by the evidence." There was no such issue concerning Strachan's obligations to the injured longshoreman, who had long ago received his workmen's compensation benefits from Strachan, and who never sued for or could have recovered damages from Strachan. The longshoreman's suit against Royal having been previously settled, the entire litigation and all issues of fact raised by the pleadings and by the evidence pertained solely to Strachan's liability to Royal.

The conduct of the trial could have left no doubt in the jury's mind as to who had the burden of proof even if the form of the special interrogatories did not reduce to insignificance any failure to make specific mention of that in the charge, to which Strachan took no exception on this account.

Strachan leaves unassailed Royal's position that its motions for a directed verdict or judgment notwithstanding the verdict should have been granted, whereupon the suffi-

ciency of the charge becomes abstract. *Vecchio* v. *Anheuser-Busch, Inc.*, 328 F. 2d 714, 715 (2 Cir. 1964), cert. denied 379 U. S. 831.

It is respectfully submitted that Royal's petition should be granted.

Respectfully submitted,

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